

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs February 3, 2009

**STATE OF TENNESSEE v. ANTHONY DEWAYNE STANTON**

**Direct Appeal from the Criminal Court for Davidson County  
No. 2006-D-3295 Cheryl A. Blackburn, Judge**

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**No. M2008-01068-CCA-R3-CD - Filed August 19, 2009**

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The defendant, Anthony Dewayne Stanton, was convicted after a Davidson County bench trial of theft of property over \$1,000 but less than \$10,000, a Class D felony, and evading arrest in a motor vehicle, a Class E felony. The defendant was sentenced as a career offender to an effective sentence of twelve years in the Tennessee Department of Correction. On appeal, the defendant raises the following issues: (1) whether evidence was sufficient to support his theft conviction; and (2) whether the trial court erred in allowing the state to cross-examine the defendant about his prior theft convictions. Upon review of the record and the parties' briefs, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed**

J.C. McLIN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and CAMILLE R. McMULLEN, JJ., joined.

Jeffrey A. DeVasher and Emma Rae Tennent (on appeal) and J. Michael Engle (at trial), Assistant Public Defenders, Nashville, Tennessee, for the appellant, Anthony Dewayne Stanton.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**Background**

After the defendant waived his right to a jury trial, the following pertinent testimony was presented at his bench trial. Officer Dylan Kinney with the Nashville Metropolitan Police Department testified that on July 31, 2006, he went to 311 Natchez Court in response to the report of a stolen vehicle. After speaking with the owner of the vehicle, Saundra Dudley, Officer Kinney

completed an offense report for the theft of a green Saturn SL-1 and forwarded the information regarding the crime to data entry personnel for inclusion in the computer system.

Officer Kevin Wallace with the Nashville Metropolitan Police Department testified that on September 13, 2006, he was assigned to a protective police unit that patrolled high crime areas. At approximately 11:30 a.m., Officer Wallace drove past a property known for drug and prostitution arrests located at 10 Garden Street and saw the Saturn exiting the property. Officer Wallace entered the license plate number of the Saturn into his mobile computer unit and determined that the vehicle was stolen. After he radioed his team members to inform them of the stolen vehicle, he activated his blue lights, signaling the driver to pull over. At trial, Officer Wallace identified the defendant as the driver of the Saturn. The defendant did not stop but increased his speed and began driving recklessly. Officer Wallace stated that he pursued the vehicle. The top speed that he reached during pursuit was fifty-five miles per hour. The defendant drove the vehicle into a pile of dirt located in front of a house that was under construction and the vehicle came to a stop. He and a female passenger exited the vehicle from the driver's side door and started to run. Officer Wallace instructed the defendant and the passenger to stop but neither obeyed his command. Officer Wallace chased the defendant behind a house and apprehended him. Officer Wallace confirmed that the vehicle was registered to Sandra Dudley and that it was towed to the police lot.

Sandra Dudley testified that on July 31, 2006, her 1997 Saturn SL-1 was stolen from the apartment complex where she lived located at 311 Natchez Court. Ms. Dudley and her daughter had been using the vehicle throughout the afternoon and evening of the previous day to move their belongings from one apartment to another within the complex. At approximately 3:30 a.m., they left the vehicle unlocked with the key in the ignition. Ms. Dudley stated that the key had become stuck in the ignition and she had not been able to remove it since the previous evening. According to Ms. Dudley, she and her daughter were away from the vehicle only a few minutes when her daughter said she heard the engine of the vehicle. They looked out of the apartment door and discovered the vehicle was no longer where Ms. Dudley had parked it.

Ms. Dudley stated that she purchased the vehicle in 2002 for \$6,700. After the vehicle had been stolen, she was told by a loan officer that it was worth \$3,300. Ms. Dudley was contacted by the police when her vehicle was recovered. When she retrieved her vehicle from the police lot, the ignition key remained stuck in the ignition switch. Ms. Dudley stated that she had not given anyone permission to be in or use her vehicle. She contacted the police within minutes of discovering that her vehicle had been stolen. On cross-examination, Ms. Dudley confirmed that her daughter, Heather Douglas was listed as the co-owner on the title of the vehicle.

The defendant testified that he was in jail on July 31, 2006, the day that Ms. Dudley's vehicle was stolen. The defendant claimed that following his release from jail, he went to a house on Harding Place and saw "Manuel," a man who he knew only by his first name, and a "younger Mexican" man sitting in a green Saturn which was parked in front of the house. The defendant stated that from his conversation with the two men, he assumed that the Saturn belonged to the younger man. On September 13, 2006, the defendant was in the parking lot of K-Mart and met

Manuel and another Mexican, not “the guy that was driving the vehicle when [the defendant] first met [Manuel].” Manuel gave the defendant the key to the vehicle and told him to take the other man to an apartment on Garden Street. According to the defendant, Manuel did not want to go to the apartment because “he had got jumped up there.” After the defendant dropped the man off at the apartment on Garden Street, he saw a girl he knew as “Angel” and agreed to take her to another location. Immediately after the defendant turned out of the apartment complex, a police car pulled up behind the Saturn and activated its blue lights. The defendant did not pull over because he believed that he had a probation violation and he thought that he would go to jail. The defendant stated that he was pursued by the police car down First Avenue to Hart Street and then onto Fourth Avenue. The defendant turned right onto Raines Avenue, stopped the vehicle, and attempted to flee on foot. He was apprehended when he fell.

On cross-examination, the defendant acknowledged that he had been convicted of burglary, theft over \$1000, theft over \$10,000, and criminal impersonation. With regard to his two convictions for criminal impersonation, the defendant agreed that on both occasions, he had given the police a false name to avoid being detected. He further agreed that on September 13, 2006, he intentionally fled when the police officer signaled him to stop but claimed that he did not know the vehicle was stolen.

The trial court found the defendant guilty of evading arrest while operating a motor vehicle and theft of property over \$1000 and the defendant was subsequently sentenced. The defendant has appealed.

## Analysis

### I. Sufficiency of the Evidence

On appeal, the defendant concedes that the evidence was sufficient to support a conviction for unauthorized use of a vehicle but challenges the sufficiency of the evidence to support a conviction of theft over \$1000. Specifically, the defendant argues that the evidence presented at trial was insufficient to establish beyond a reasonable doubt that he intended to deprive Ms. Dudley of her vehicle.

In reviewing defendant’s challenge to the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the state to determine whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Once the trier of fact finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the state is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *Id.*; *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier

of fact. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Accordingly, in a bench trial, the trial judge, as the trier of fact, must resolve all questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence. *State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998). A trial judge's verdict carries the same weight as a jury verdict. *State v. Hatchett*, 560 S.W.2d 627, 630 (Tenn. 1978). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. The guilt of the defendant as well as any fact required to be proved may be established by direct evidence, by circumstantial evidence, or by a combination thereof. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). On appeal, we do not attempt to re-weigh or re-evaluate the evidence. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006).

“A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent.” Tenn. Code Ann. § 39-14-103.

Taken in the light most favorable to the state, the testimony of Ms. Dudley established that her vehicle was taken without her consent and that the value of her vehicle was over \$1000. The testimony of Officer Wallace and the defendant established that the defendant was driving the stolen vehicle on September 13, 2006, when Officer Wallace activated his blue lights and made an attempt to stop the defendant. The defendant admitted he knew that the police officer was attempting to make a stop and that he intentionally fled. In finding that the evidence supported the charge of theft, the trial court discredited the defendant's testimony that he fled from the police because he thought that he had a probation violation. Neither the defendant's testimony that he was in jail on the day the vehicle was stolen, nor his claim that he received the vehicle from an individual named “Manuel” was corroborated. We further note that the defendant's claim that he was given the key to the vehicle by Manuel conflicted with the testimony of Ms. Dudley. Ms. Dudley testified that the ignition key was stuck in the ignition switch at the time that vehicle was stolen and that the key was still stuck in the ignition switch when she retrieved her vehicle from the police lot. The trial court, as was its prerogative, resolved the questions concerning the credibility of witnesses and the weight and value to be given the evidence, in favor of the state. *See Bland*, 958 S.W.2d at 659. In our view, the record supports the findings of the trial court regarding the sufficiency of the evidence. We further note that the defendant's reliance on *State v. David Michael Gamble*, No. 03C01-9812-CR-00442, 2000 WL 45718 (Tenn. Crim. App., at Knoxville, Jan. 21, 2000), is misguided. In *Gamble*, the defendant had permission from his employer to drive the employer's truck and trailer but abandoned his route and was later found in the truck in an incoherent state. *Id.* at \*1-2. The court found, *inter alia*, that the state's contention that the defendant intended to sell the load of furniture to buy crack cocaine was mere speculation and insufficient to establish a conscious objective or desire to permanently deprive the owner of his property. *Id.* at \*3-5. In the instant case, the owner of the vehicle never gave the defendant or anyone else permission to use her vehicle. The defendant attempted to flee from Officer Wallace while driving the stolen vehicle. Accordingly, we conclude that the evidence was sufficient to sustain the defendant's conviction for theft of property over \$1,000. The defendant is not entitled to relief on this issue.

## II. Use of Prior Convictions to Impeach the Defendant's Testimony

The defendant asserts that the trial court erred in allowing the state to impeach the defendant with prior convictions for theft of property. Specifically, the defendant argues that the trial court “failed to conduct the required analysis before allowing the state to impeach the defendant with his prior theft convictions,” and asserts that “the probative value of the prior theft convictions was not outweighed by the danger of their unfair prejudicial effect.” The state argues that the trial court engaged in the required weighing procedure and that the defendant has not shown an abuse of discretion. The state argues in the alternative that even if the trial court erred in allowing evidence of the defendant's prior theft convictions, the defendant was not unfairly prejudiced.

This court reviews a trial court's ruling on the admissibility of prior convictions for impeachment purposes under an abuse of discretion standard. *See State v. Waller*, 118 S.W.3d 368, 371 (Tenn. 2003).

Rule 609 of the Tennessee Rules of Evidence permits the accused's credibility to be impeached by prior criminal convictions on cross-examination if certain conditions and procedures are satisfied. The conviction must be for a crime (1) punishable by death or incarceration in excess of one year, or (2) involving dishonesty or false statement. Tenn. R. Evid. 609(a)(2). Generally, convictions that are ten years old or more cannot be used for purposes of impeachment. Tenn. R. Evid. 609(b). The State is also required to give reasonable written notice prior to trial of the particular convictions it intends to use to impeach the accused. Tenn. R. Evid. 609(a)(3). Before permitting the use of a prior conviction, the trial court must find that the probative value of the conviction on the issue of credibility outweighs its unfair prejudicial effect on the substantive issues. *Id.* The trial court shall rule on the admissibility of the prior conviction before the accused testifies. *Id.* If the court rules that the prior conviction is admissible to impeach, there is no requirement that the accused testify at trial in order to later challenge the court's ruling on the admissibility of the prior conviction. *Id.*

“The mere fact a prior conviction of the accused is identical or similar in nature to the offense for which the accused is being tried does not, as a matter of law, bar the use of the conviction to impeach the accused as a witness.” *State v. Baker*, 956 S.W.2d 8, 15 (Tenn. Crim. App. 1997) (citations omitted). However, “[w]hen an impeaching conviction is substantially similar to the crime for which the defendant is being tried, there is a danger that jurors will erroneously utilize the impeaching conviction as propensity evidence of guilt and conclude that since the defendant committed a similar offense, he or she is probably guilty of the offense charged.” *State v. Mixon*, 983 S.W.2d 661, 674 (Tenn. 1999) (citations omitted). Accordingly, trial courts should engage in a two prong analysis when determining if the probative value of the impeaching conviction is outweighed by its prejudicial effect. *Id.* Trial courts are required to expressly (1) “analyze the relevance the impeaching conviction has to the issue of credibility,” as well as (2) “assess the similarity between the crime on trial and the crime underlying the impeaching conviction.” *Id.* (citations omitted).

Prior to the bench trial, the state notified the defendant of its intent to use eight prior convictions including four prior theft convictions, one burglary conviction, and two convictions for criminal impersonation. The defendant filed a motion in limine to prohibit any mention of the defendant's prior convictions. Upon hearing the motion, the trial court stated:

[T]heft is by its very nature a crime of dishonesty. It goes to the heart of the credibility. [The defendant is] also charged with theft. I have to sort of weigh this out. . . .

. . . .

. . . I just can't think of a crime that would be more to the heart of the issue of credibility than theft, even though [the defendant] is charged with that. I'm going to listen to the proof, but before I rule I want to hear the proof. But, you know, his credibility is going to be at issue and theft - at this point . . . I will probably allow the thefts.

It appears that the trial court conducted a balancing analysis in considering the admissibility of the defendant's prior convictions of theft and found that the past convictions of theft weighed heavily on the issue of credibility. The court stated a probable ruling to deny the defendant's motion as to the prior theft convictions but also stated a desire to "hear the proof." It is therefore unclear if the court made a final ruling on the issue before the defendant testified.

The defendant argues on appeal that the ruling was not final and that the trial court erred in allowing the state to impeach the defendant with the prior theft convictions. We note that during the prosecutor's cross-examination of the defendant, defense counsel made no contemporaneous objection to the prosecutor's question about two 1999 theft convictions. The defendant testified regarding those convictions and the state proceeded to question the defendant on two other prior theft convictions. The only objection by defense counsel during the cross-examination of the defendant on his prior convictions was an objection to the state's reference to the underlining facts of the convictions of criminal impersonation.

In most cases, the failure to raise a contemporaneous objection to the admission of evidence at the time the evidence is introduced at trial results in waiver of the particular issue on appeal. *See* Tenn. R. App. P. 36(a); *State v. Thompson*, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000). However, an objection is considered contemporaneous if counsel makes the objection in a motion in limine and the particular issue is considered and ruled upon. *State v. Alder*, 71 S.W.3d 299, 302 (Tenn. Crim. App. 2001). In such cases, counsel is not required to make repetitious objections to issues which have been previously ruled upon in order for that issue to be preserved for appeal. *Id.* Nonetheless, counsel must be vigilant to object contemporaneously to issues which are only tentatively suggested or incompletely developed in connection with a motion in limine, otherwise,

counsel risks waiver of the issue on appeal. *Id.*; see also *State v. McGhee*, 746 S.W.2d 460, 462 (Tenn. 1988).

The record reflects that although the defendant raised this particular issue in a motion in limine, he did not make a contemporaneous objection to the cross-examination of the defendant on his prior theft convictions. As such, the defendant risked waiver of the issue by failing to make a contemporaneous objection when the state posed the first question regarding the defendant's prior theft convictions. Appellate relief is not required when a party has "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a). Notwithstanding any waiver of the issue by the defendant's failure to object, in our view, the defendant has failed to demonstrate that the court erred in allowing evidence of the defendant's prior theft convictions. First, the court performed an analysis and determined the convictions were highly pertinent to the issue of credibility. See *Mixon*, 983 S.W.2d at 674. Second, since the trier of fact was the trial court and not a jury, there was no danger that a jury would incorrectly utilize evidence of a defendant's prior convictions as propensity evidence of guilt. See *id.* Third, the record supports that the trial court did not misuse the evidence. Finally, even if the trial court erroneously admitted evidence of prior theft convictions, the defendant has failed to show that he was prejudiced by the evidence and the record does not support the defendant's claim. In discrediting the defendant's testimony, the trial court expressly relied on the lack of plausibility of the defendant's explanation and not on the defendant's prior convictions for theft. We conclude that the defendant is not entitled to relief on this issue.

#### Conclusion

Based on the foregoing, we affirm the judgments of the trial court.

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J.C. McLIN, JUDGE